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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHAN J. SOTO,

Defendant and Appellant.

B267396

(Los Angeles County
Super. Ct. No. MA059556)

Appeal from an order of the Superior Court of the State of California, Kathleen Blanchard, Judge. Affirmed.

Law Office of Elizabeth K. Horowitz, Elizabeth K. Horowitz
for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Senior
Assistant Attorney General, Mary Sanchez, Supervising Deputy
Attorney General, and Michael C. Keller, Deputy Attorney
General, for Plaintiff and Respondent.

Defendant and appellant Nathan Soto appeals from the trial court's order denying his motion for resentencing. According to defendant, the trial court was obligated to reduce his sentence because his term was doubled due to his prior "strike" felony conviction under the Three Strikes law and, nine months after sentencing, that prior conviction was reduced to a misdemeanor pursuant to Proposition 47.¹

We hold Proposition 47 does not apply retroactively to a sentence that was imposed under the Three Strikes law and final prior to the enactment of Proposition 47. We therefore affirm the order denying resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2014, defendant pleaded no contest to one count of assault with a firearm in violation of section 245, subdivision (a)(2). He also admitted he had a prior strike conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d) (collectively the Three Strikes law) for theft of a firearm in violation of section 487, subdivision (d)(2), case number MA041680. The trial court sentenced defendant to a middle term of three years, doubled to six years based on the admitted strike offense.

In January 2015, defendant moved for resentencing in the earlier case, number MA041680, pursuant to Proposition 47. The trial court granted the unopposed motion and reduced defendant's conviction for theft of a firearm to a misdemeanor under sections 490.2 and 1170.18.

¹ Penal Code section 1170.18. All further statutory references are to the Penal Code.

Defendant next filed a petition for a writ of habeas corpus in the trial court seeking resentencing in this case. Defendant argued that because his prior strike conviction in the earlier case was no longer a felony, it could not serve as the basis for doubling his middle term sentence of three years. The trial court treated defendant's petition for a writ of habeas corpus as a motion for resentencing and, following argument, ruled that defendant was not eligible for relief in this case under Proposition 47.

DISCUSSION

Defendant contends the reduction under Proposition 47 of his prior strike conviction to a misdemeanor entitles him to resentencing in this case. According to defendant, the prior strike felony that was used to double his sentence is now a misdemeanor "for all purposes" (§ 1170.18, subdivision (k)), including resentencing in a case where judgment was entered prior to the passage of Proposition 47. The Attorney General argues Proposition 47 was not intended to be applied retroactively to prior convictions that were properly used, prior to the passage of Proposition 47, to trigger an alternative sentencing scheme. In support of this position, the Attorney General cites four recent Court of Appeal opinions: *People v. Williams* (2016) 245 Cal.App.4th 458; *People v. Carrea* (2016) 244 Cal.App.4th 966; *People v. Ruff* (2016) 244 Cal.App.4th 935; and *People v. Valenzuela* (2016) 244 Cal.App.4th 692.²

Subsequent to the filing of the respondent's brief, the Supreme Court granted review in each of the cases relied upon by

² Defendant cites no authority that directly holds Proposition 47 is to be applied retroactively under the circumstances presented in this case.

the Attorney General and ordered them depublished. (See *People v. Williams* 201 Cal.Rptr.3d 885, 369 P.3d 553, 2016 Cal. LEXIS 3133 (Cal. 2016); *People v. Carrea* 201 Cal.Rptr.3d 255, 368 P.3d 922, 2016 Cal. LEXIS 2423 (Cal. 2016); *People v. Ruff*, 2016 Cal. LEXIS 3131 (Cal. 2016); and *People v. Valenzuela*, 200 Cal.Rptr.3d 304, 367 P.3d 682, 2016 Cal. LEXIS 1852 (Cal. 2016). Because the decisions upon which the Attorney General relies have been superseded by grants of review, we cannot cite them as authority for affirming the denial of the motion for resentencing.

Nevertheless, we affirm the trial court's order. For purposes of this appeal, we reject defendant's argument and conclude the Attorney General's position is consistent with the language and intent of Proposition 47. According to the California Supreme Court's website, the following issue is currently pending determination before that Court: "Is defendant eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction after the superior court had reclassified the underlying felony as a misdemeanor under the provisions of Proposition 47?" Because this case will be governed by our Supreme Court's ultimate resolution of the issue now pending before it, we do not discuss it further.

DISPOSITION

The order denying defendant's motion for resentencing is affirmed.

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KUMAR, J.*

I concur:

KRIEGLER, Acting P. J.

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

People v. Nathan J. Soto

B267396

BAKER, J., Concurring

I concur in the result only. In my view, a petition for habeas corpus, not a petition pursuant to Penal Code section 1170.18, is the proper means for defendant Nathan Soto to present the contention he urges in this appeal. The denial of a petition for habeas corpus, however, is not appealable. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.)

BAKER, J.